IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 41749-9-II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY THOMAS LYNCH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00253-2

BRIEF OF RESPONDENT

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SERVICE	
Mr. Casey Grannis Nielsen, Broman & Koch, PLLC 1908 E. Madison Seattle, WA 98122	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: October 10, 2011, at Port Angeles, WA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases: **Page(s)**

Washington Cases: **Page(s)**

Statutes:

Rules:

I. COUNTER STATEMENT OF THE ISSUES:

1. Did the trial court relieve the State of its burden to prove beyond a reasonable doubt the elements of "forcible compulsion" in a prosecution for second-degree rape and indecent liberties when it gave a pattern jury instruction on the law of consent?

2. Did the trial court err when, over the defendant's objection, it gave a pattern jury instruction that informed the jury on the law of consent after the defendant (1) introduced testimony that the victim consented to have sex with him, (2) argued that the victim consented to have sex with him, and (3) acknowledged he relied on a consent defense of consent at trial?

3. Did the consent instruction constitute harmless error when the jury had to assess whether the State proved each element of the alleged crimes before it ever considered the affirmative defense instruction on consent?

4. Did the trial court err when it imposed a 74-month confinement term for an indecent liberties conviction when the defendant had an offender score of zero?

5. Did the trial court err when it imposed certain community custody conditions that were not crime related?

II. STATEMENT OF THE CASE:

FACTS

TS met the defendant, Jeffrey Lynch, via Narcotics Anonymous.[1] RP (10/26/2010) at 10-11, 93. The two individuals were co-chairs for the

[1] Narcotics Anonymous (NA) is a twelve-step program modeled after Alcoholics Anonymous (AA). The organization is a fellowship of men and women for whom drugs had become a major problem. The program provides a peer support network and a group-oriented recovery process from drug addiction.

support group's activities committee. RP (10/26/2010) at 10-11, 22. During the 2.5 years the two were friends, there was never a romantic relationship. RP (10/26/2010) at 10, 12, 19, 134-35, 145.

On May 9, 2009, Lynch invited TS and other NA members to his home to watch a movie. RP (10/26/2010) at 12-13, 27, 94. Heather Case, Nichole Simpson, and TS's two-year old son, RB, attended the event. RP (10/26/2010) at 13, 57, 63, 94-95.

The group spent the first part of the evening conversing, drinking coffee, and listening to music. RP (10/26/2010) at 13. At no point did Lynch or TS make romantic overtures toward one another. RP (10/26/2010) at 57, 136. When the group finally started the movie around 11:00 p.m., Case left to pick-up her daughter, and RB had fallen asleep in the defendant's bedroom. RP (10/26/2010) at 14-15, 27, 59, 63, 64, 95.

TS and Simpson sat together on a love seat, with Lynch sitting between his two guests. RP (10/26/2010) at 15, 29-30, 64, 97. Due to the late hour, Simpson and TS quickly fell asleep. RP (10/26/2010) at 15, 30-31, 63, 100. When Simpson woke up, she went to sleep in the bed with RB. RP (10/26/2010) at 31, 64-65, 99.

When TS woke up, Lynch was lying "all over" the top of her. RP (10/26/2010) at 16, 32-36. Lynch had his hand half way down TS's pants,

and he was touching her pubic area. RP (10/26/2010) at 16-17, 32-33, 36. With her one free hand, TS tried to pull Lynch's hand out saying "no, uh uh." RP (10/26/2010) at 17, 36. However, Lynch forcibly pushed his hand back down TS's pants. RP (10/26/2010) at 17, 36.

TS tried to resist Lynch's forceful advances:

> This happened two or three times and the harder I pulled out the more forceful he got and then by like the third time he had touched my vagina, his fingers were in my vagina.

RP (10/26/2010) at 17. *See also* RP (10/26/2010) at 19, 36-37. The digital penetration caused TS considerable pain. RP (10/26/2010) at 49. Nonetheless, TS never cried for help because she did not want to wake her son and, thereby, put him at risk. RP (10/26/2010) at 17-18, 37. *See also* RP (10/26/2010) at 47-48.

In order to cope with the stress of the assault, TS "checked out" and tried to fall asleep. RP (10/26/2010) at 18, 38, 46-47. TS could hear Lynch whisper in her ear, "I warned you not to moan in your sleep around me." RP (10/26/2010) at 18. Lynch eventually stopped, but he continued to lie on top of TS. RP (10/26/2010) at 19, 38.

Lynch soon began abusing TS a second time. RP (10/26/2010) at 19, 39. Again, he pushed his hands down her pants and digitally penetrated her vagina. RP (10/26/2010) at 19. Lynch also exposed his

penis, and made TS hold his erection. RP (10/26/2010) at 19, 41-42. TS could feel that the defendant was sexually aroused. RP (10/26/2010) at 19-20. When TS pulled her hand away, Lynch promptly put her hand back on his penis. RP (10/26/2010) at 20. TS froze. RP (10/26/2010) at 20, 39-40, 49.

Frustrated, Lynch stopped and left to smoke a cigarette. RP (10/26/2010) at 20, 45. When he returned, he went to sleep in front of the couch. RP (10/26/2010) at 45, 47. TS fell asleep on the sofa, relieved the assault was over. RP (10/26/2010) at 20, 45. 47-49.

At approximately 6:00 a.m., TS got her son and quietly departed the residence. RP (10/26/2010) at 21, 45. TS left Simpson behind despite being her ride home. RP (10/26/2010) at 66. When Simpson awoke, and learned TS had left, she walked to TS's home. RP (10/26/2010) at 66. Simpson found TS curled-up in her bed, looking as if she had been crying. RP (10/26/2010) at 66. TS refused to tell Simpson what was wrong. RP (10/26/2010) at 55. However, the next day she confided in Simpson that Lynch sexually assaulted her. RP (10/26/2010) at 67.

TS reported the incident to police three weeks later. RP (10/26/2010) at 21, 39-40. In the weeks following the incident, TS received a series of text messages from Lynch. RP (10/26/2010) at 21-22, 114. These messages communicated Lynch's apology for having "crossed

a line" that existed between the friends.[2] RP (10/26/2010) at 115-16, 118. TS forwarded the messages to the police. RP (10/26/2010) at 23.

Pursuant to a wire order, TS phoned Lynch. RP (10/26/2010) at 23, 80, 87. During the recorded conversation, Lynch expressed regret for what transpired between the two. RP (10/26/2010) at 43-44. *See also* Exhibit 4-5. TS told Lynch he should have known to stop after she pushed his hands away:

> Lynch: I understand why you're so upset, then. I only remembered you pushed me away once.
>
> TS: Once? Well, even just once, that should have been enough, Jeff!
>
> Lynch: I know that. And that's ... that should have been enough, I know.
>
> TS: And it ... but it wasn't, you know? Because I grabbed your wrist, like, three to four times! And, like, the second time, you finally got ... you know ... you ... pushed it harder. And I ... you know .. and ... (sigh). And then my baby, you know ... [R.B.] was sleeping in the other room.
>
> Lynch: I know that.
>
> ...

[2] According to Lynch, the texts only communicated an apology for introducing sex into the friendship. Lynch denied that he was confessing having committed a criminal act. RP (10/26/2010) at 116-18, 137-38, 143.

TS: You … you know, if you … know that it was wrong, why didn't you stop when I tried to get you to stop?

Lynch: I don't know.

See Exhibit 5 at 4, 6. *See also* RP (10/26/2010) at 122-24.[3]

Detective Bruce Knight subsequently invited Lynch to the Port Angeles Police Station. RP (10/26/2010) at 83, 88. At the police station, Knight informed Lynch that he was the subject of a police investigation. RP (10/26/2010) at 89. After advising Lynch of his constitutional rights, Knight conducted a recorded interview. RP (10/26/2010) at 83. *See also* Exhibit 6 at 1. During the interview, Lynch admitted he started rubbing TS's clitoris while she was asleep.[4] *See* Exhibit 6 at 5; RP (10/26/2010) at 86, 140, 142.

PROCEDURAL HISTORY

The State charged Lynch with (1) Rape in the Second Degree, and (2) Indecent Liberties.[5] CP 84-85, 112-15. At trial, the State's witnesses testified in accordance with the facts outlined above. Lynch maintained

[3] According to Lynch, he made this concession only to appease TS. RP (10/26/2010) at 122-23. He maintained that when TS brushed his hand off, she was not communicating a "no" it was just a reaction. RP (10/26/2010) at 101, 123.

[4] According to Lynch, he denied that he admitted touching TS's private area while she was asleep. RP (10/26/2010) at 129-30.

[5] The trial court refused to instruct the jury on the alternative means of "physically helpless." RP (10/26/2010) at 152. *See also* CP 84-85.

the sexual encounter with TS was consensual. *See e.g.* RP (10/26/2010) at 101-06, 124, 132. However, he denied that TS ever touched his penis. RP (10/26/2010) at 113, 131.

After the evidentiary portion of the trial, Lynch requested a "to convict" instruction requiring the State to prove beyond a reasonable doubt the absence of consent. CP 73; RP (10/26/2010) at 155. The trial court refused to give the requested directive, but prepared the following relevant instructions:

No. 7

> To convict the Defendant of the crime of RAPE IN THE SECOND DEGREE as charged in Count I, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 10th day of May, 2009, the Defendant engaged in sexual intercourse with T.S.;
> (2) That the sexual intercourse occurred by forcible compulsion, and
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 12

To convict the Defendant of the crime of INDECENT LIBERTIES as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt.

(1) That on or about the 10th day of may, 2009, the Defendant knowingly caused T.S. to have sexual contact with the Defendant;
(2) That this sexual contact occurred by forcible compulsion.
(3) That the Defendant was not the spouse or registered domestic partner of T.S. at the time of the sexual contact; and
(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 16

A person is not guilty of RAPE or INDECENT LIBERTIES if the sexual intercourse or sexual contact is consensual. Consent means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

The defendant has the burden of proving that the sexual intercourse or sexual contact was consensual by a preponderance of the evidence. Preponderance of the

> evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 57, 62, 66. The trial court also defined the term "forcible compulsion" CP 60.

Lynch opposed jury instructions No. 7 and No. 16. RP (10/27/2010) at 5, 15. While Lynch conceded his defense was one of "consent," he argued instruction No. 16 violated his right to control his own defense, and it unconstitutionally shifted the burden of proof to the defense. RP (10/27/2010) at 5, 7, 16. *See also* RP (10/27/2010) at 25-29, 31, 37. The trial court ruled the instructions properly stated the law.

The trial court repeatedly informed the jury that the State had the burden of proving each element of the crimes beyond a reasonable doubt, and the defendant had no burden to prove a doubt existed. CP 54. *See also* CP 57, 62, 66. The defense strenuously argued that the State had failed to prove second-degree rape because TS had consented to have sex with Lynch. RP (10/26/2010) at 101-06, 124, 132.

During its deliberation, the jury submitted the following question:

> It seems contradictory re: the burden of proof law. (1) [The] State needs to prove beyond a reasonable doubt re: 2nd degree rape charge (pg. 4) [burden of proof instruction] (2) The defendant has the burden of proof re:

> that the sexual intercourse or sexual contact was consensual.
>
> Does the defendant bear the burden of proving that indecent liberties did not occur? Instructions 11, 12, 13, 16.
>
> Do we assume indecent liberties occurred unless the evidence shows us otherwise?

CP 47. *See also* RP (10/27/2010) at 52-54. The parties agreed to the following response:

> The State has the burden of proving each of the elements of each crime beyond a reasonable doubt. The defendant's burden of proof as stated in Instruction 16 is by a preponderance of the evidence and that burden is limited to consent only.

CP 47. *See also* RP (10/27/2010) at 52-54. After its deliberations, the jury found Lynch guilty as charged. CP 45-46; RP (10/27/2010) at 58.

Lynch subsequently moved for a new trial. CP 27-44; RP (12/21/2010) at 4. Again, Lynch affirmed his defense was consent and that he introduced testimony to support his argument. RP (12/21/2010) at 4-5. However, Lynch claimed that *State v. McSorley* and *State v. Gregory* established that instruction No. 16 was improper. RP (12/21/2010) at 4.

The trial court struggled to understand how it had forced Lynch to accept a consent defense, when the defense always intended to argue consent and presented testimony to support its theory of the case. RP (12/21/2010) at 5. Lynch claimed his actual defense was irrelevant to the

analysis. RP (12/21/2010) at 7-8. According to Lynch, the court could only give a consent instruction if the defendant agreed. RP (12/21/2010) at 8. When the court asked when a defendant would request an instruction that imposed an affirmative obligation on the defense, the defense had no response. RP (12/21/2010) at 8. Nonetheless, Lynch maintained Instruction No. 16 violated due process and confused the jury. RP (12/21/2010) at 11.

The trial court denied the motion for a new trial. CP 24-25. The court reasoned the case law did not support the position that the instruction was improper. CP 25; RP (12/21/2010) at 11-12. The court ruled instruction No. 16 was appropriate because Lynch relied on a theory of consent and introduced testimony that claimed the sexual encounter with the victim was consensual. CP 24-25; RP (12/21/2010) at 12-13. The trial court further found its subsequent response to the jury eliminated any ambiguity regarding the burden of proof. CP 24-25; RP (12/21/2010) at 12-13.

At sentencing, the trial court noted Lynch did not have any criminal history. CP 9; RP (2/1/2011) at 25. Additionally, the trial court found Lynch's crimes constituted the same criminal conduct. RP (2/1/2011) at 19. The trial court imposed (1) a 90-month confinement term for the second-degree rape conviction, and (2) a 74-month confinement

term for indecent liberties. CP 11; RP (2/1/2011) at 28. The trial court ordered the two sentences to run concurrently. RP (2/1/2011) at 28.

Additionally, the trial court imposed several community custody conditions. CP 11-13, 22-23; RP (2/1/2011) at 28. The defense did not object to these conditions. RP (2/1/2011) at 27.

Lynch appeals.

III. ARGUMENT:

A. THE CHALLENGED CONSENT INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE ALLEGED CRIMES BEYOND A REASONABLE DOUBT.

At the heart of the present appeal is a due process challenge. Lynch argues the trial court's instructions violated due process because they placed the burden of proving consent on the defense. *See* Brief of Appellant at 33-38. Lynch claims the consent instruction confused the jury and relieved the State of its burden to prove each element of the alleged crimes, specifically the elements of forcible compulsion. *See* Brief of Appellant at 33-38. The contention is without merit because the Washington Supreme Court has rejected this same argument in *State v. Gregory*, 158 Wn.2d 759, 801-04, 147 P.3d 1201 (2006), and *State v. Camara*, 113 Wn.2d 631, 635-40, 781 P.2d 483 (1989).

The trial court properly and repeatedly instructed the jury that the State had the burden of proving each element of the crimes charged beyond a reasonable doubt. CP 47, 54, 57, 62. The challenged consent instruction was a verbatim copy of WPIC 18.25. CP 66. The instruction was a correct statement on the law of consent, and it did not relieve the State of its burden of proof. *Gregory*, 158 Wn.2d at 801-04; *Camara*, 113 Wn.2d at 635-40, WPIC 18.25. The Supreme Court's established precedent controls the present analysis. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (citing *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982); *Godefroy v. Reilly*, 146 Wash. 257, 262 P. 639 (1928)). There was no due process violation.

B. THE CHALLENGED CONSENT INSTRUCTION DID NOT VIOLATE THE DEFENDANT'S RIGHT TO CONTROL HIS OWN DEFENSE.

Lynch goes to great lengths to argue the consent instruction violated his constitutional right to control his own defense when the trial court, over his objection, instructed the jury on the law of consent. *See* Brief of Appellant at 10-33. Because Lynch presented evidence that he contended excused his actions, the trial court properly instructed the jury that the defense had the burden of proving consent by a preponderance of the evidence. There was no error.

Every competent defendant "has a *constitutional* right to at least broadly control his own defense." *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (alteration in original). Neither the trial court, nor the State, can compel a defendant to raise or rely on an affirmative defense. *State v. McSorley*, 128 Wn. App. 598, 605, 116 P.3d 431 (2005). When considered as a whole, "[j]ury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

At trial, Lynch testified that TS welcomed his advances and consented to sexual intercourse (digital penetration). RP (10/26/2010) at 101-06, 124, 132. *See also* Ex. 6 at 5-7. Following the evidentiary portion of the trial, the defense proposed a jury instruction requiring the jury to consider the legal effect of the evidence purporting to show consent. CP 73. Finally, the defense strenuously argued that the State failed to prove "forcible compulsion" because TS consented to the sexual acts. RP (10/27/2010) at 25-29, 31, 37. *See also* (12/21/2010) at 4-5.

If a defendant raises a consent defense in a rape prosecution, the law permits the trial court to instruct the jury that the defense bears the burden to prove consent by a preponderance of the evidence. *Gregory*, 158 Wn.2d at 801-04; *Camara*, 113 Wn.2d at 635-40; WPIC 18.25. Here, the

trial court's instructions were supported by the evidence that the parties presented at trial. When read as a whole, these instructions properly state the law on (1) second-degree rape, (2) indecent liberties, and (3) the legally cognizable defense of consent. CP 54, 57, 62, 66. *See also* RCW 9A.44.050(1)(a), 9A.44.100(1)(a); *Gregory*, 158 Wn.2d at 801-04; *Camara*, 113 Wn.2d at 635-40; WPIC 18.25, 41.02, 49.02.

The instructions also permitted Lynch to argue his theory of the case, while affirming that the State had the burden of proving each element of the crimes charged beyond a reasonable doubt. CP 47, 54, 57, 62, 66. There was no error.

Lynch voluntarily supplied the factual predicate for the consent instruction, but argues he should not receive the legal implications of the defense he chose to submit to the jury. *See* RP (12/21/2010) at 8, Brief of Appellant at 21-23. This fact distinguishes the present case from the legal authority Lynch cites on appeal.

In *State v. Jones*, the defendant affirmed his sanity and maintained that he acted in self-defense. 99 Wn.2d 735, 737, 747, 664 P.2d 1216 (1983). Nonetheless, the court forced the defendant to present an insanity defense, and it instructed the jury accordingly. *Jones*, 99 Wn.2d at 738-39, 747. This resulted in the defense having to present two inconsistent defenses. *Jones*, 99 Wn.2d at 748. Unlike *Jones*, Lynch voluntarily

presented evidence that TS consented to have sex with him, which provided the factual predicate for the challenged instruction. RP (10/26/2010) at 101-06, 124, 132. Unlike *Jones*, Lynch did not present inconsistent defenses at trial. RP (10/27/2010) at 25-29, 31, 37; RP (12/21/2010) at 4-5.

In *State v. McSorley*, 128 Wn. App. 598, 601, 116 P.3d 431 (2005), the defendant was charged with child luring. The defendant denied he ever spoke to the alleged child victim, and his defense consisted of a general denial. *McSorely*, 128 Wn. App. at 601, 603. Nonetheless, the trial court instructed the jury on the affirmative defense of child luring. *McSorely*, 128 Wn. App. at 603. Here, Lynch did not rely on a general denial with respect to the second-degree rape prosecution. RP (10/27/2010) at 25-29, 31, 37; RP (12/21/2010) at 4-5. The defense he presented with respect to that charge was consistent with court's consent instruction. While Lynch did deny the allegation of indecent liberties, the consent instruction did not affect the outcome at trial. *See below*.

Finally, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), does not support the position that Lynch advocates. *Faretta* only recognizes that a criminal defendant has a constitutional right to represent himself at trial without the assistance of counsel. It embodies "the conviction that a defendant has the right to decide, within limits, the

type of defense he wishes to mount." *Jones*, 99 Wn.2d at 740, 742. However, it does not permit a defendant to dictate to the trial court how it should instruct the jury, especially when he proposes instructions that misstate the applicable law. *See* CP 73.

Lynch's defense to his prosecution for second-degree rape was consent. This was a theory that he voluntarily submitted to the jury. He alone supplied the factual predicate for the consent instruction. The trial court never imposed an affirmative defense on Lynch. Rather, it clarified any potential confusion the jury may have experienced regarding the legal sufficiency of the defense he present at trial. There was no error.

C. THE CONSENT INSTRUCTION WAS HARMLESS.

Even if this court assumes that the trial court erred when it gave the challenged consent instruction, the error was harmless. An instructional error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States,* 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

In the present case, there was no inconsistency between the consent instruction and the defense Lynch advanced with respect to second-degree rape. The jury clearly rejected the contention that TS

consented to have sex with Lynch. Thus, the affirmative defense instruction did not prejudice the defense. *State v. Coristine*, 161 Wn. App. 945, 951, 252 P.3d 403 (2011) (citing *State v. Jones*, 99 Wn.2d at 748, 664).

Admittedly, the trial court should have limited its consent instruction to the single crime of second-degree rape because Lynch relied on a general denial to the charge of indecent liberties. However, the challenged instruction did not come into play until the jury first found the State had proved each element of second-degree rape and indecent liberties. *Coristine*, 161 Wn. App. at 951. Thus, even without the instruction, the jury would have still found Lynch guilty on both crimes. The jury clearly rejected Lynch's general denial with respect to the charge of indecent liberties. Any error was harmless.

The jury's question to the trial court does not support Lynch's claim that the consent instruction adversely affected its deliberations. The question only concerned the jury's deliberation on indecent liberties, not second-degree rape. CP 47. The trial court clarified that the State had the burden of proving the elements of both crimes beyond a reasonable doubt; and the defendant's burden was limited only to the issue of consent. CP 47. As stated above, because the consent instruction did not come into play until the jury had evaluated whether the State established its burden

of proof for both second-degree rape and indecent liberties, the jury would have found Lynch guilty of both crimes regardless of the consent instruction. Any error was harmless.

D. THE INDECENT LIBERTIES SENTENCE EXCEEDS THE STANDARD RANGE.

Lynch argues the trial court erred when it imposed a confinement term that exceeds the maximum standard range. *See* Brief of Appellant at 38-40. The State concedes error. This Court should remand for resentencing, instructing the trial court to resentence Lynch within the standard range for the indecent liberties conviction.

The standard range sentence for indecent liberties with forcible compulsion with an offender score of '0' is 51 to 68 months. RCW 9.94A.525 (2009). Here, the trial court sentenced Lynch to 74 months. CP 11. While Lynch also committed second-degree rape by forcible compulsion, the trial court expressly found that his two crimes constituted the same criminal conduct. RP (2/1/2011) at 19. As such, the trial court erred when it imposed a 74-month sentence for Lynch's conviction for indecent liberties.

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E. THE COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED SEVERAL COMMUNITY CUSTODY CONDITIONS.

Lynch argues the trial court erred when it imposed several community custody conditions. *See* Brief of Appellant at 40-50. The State concedes error. This Court should remand for resentencing, instructing the trial court to strike/correct the contested conditions.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This Court reviews de novo whether the trial court had the statutory authority to impose challenged conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The law in effect at the time of the offense controls the sentence. RCW 9.94A.345; *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Here, Lynch committed second-degree rape and indecent liberties, both by forcible compulsion, on or about May 10, 2009. In addition to his term of confinement, Lynch was subject to community custody. Former RCW 9.94A.712(5) (2009).[6]

The applicable statute is former RCW 9.94A.712(6)(a)(i), (6)(b) (2009), which provides:

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[6] On August 1, 2009, the Legislature recodified RCW 9.94A.712 as RCW 9.94A.507.

> Unless a condition is waived by the court, the conditions of community custody *shall* include those provided for in RCW 9.94A.700(4). The conditions *may* also include those provided for in RCW 9.94A.700(5). The court *may* also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct *reasonably related* to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(Emphasis added). RCW 9.94A.700(4)(c) (2009) reads, "[t]he offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions[.]" *See also* RCW 9.94A.703(2)(c) (2009). Additionally, the trial court has the discretion to order an offender (1) not to consume alcohol while under community custody, and (2) comply with any crime-related prohibitions. RCW 9.94A.700(5)(d), (e) (2009). *See also* RCW 9.94A.703(3)(e), (f) (2009). A "crime related prohibition" was defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted[.]" RCW 9.94A.030(13) (2009). "However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department." RCW 9.94A.030(13) (2009). In the present case, there was no evidence to show Lynch sexually abused TS while under the influence of drugs or alcohol.

1. The prohibition on alcohol possession and entering places where it is the chief item of sale.

The trial court is limited to the types of alcohol related community custody conditions it can order depending on the nature of the crime committed.

In *State v. Jones*, 118 Wn. App. 199, 202-03, 76 P.3d 258 (2003), the defendant pleaded guilty to first-degree burglary and "several other crimes." In addition to a prison sentence, the trial court imposed conditions of community custody relating to alcohol consumption and treatment. *Id.* at 202-03. However, there was no evidence to show alcohol contributed to the defendant's crimes. *Id.* at 202-03, 207-08.

The *Jones* court found the trial judge had the authority to prohibit alcohol consumption, but he could not order the defendant "to participate in alcohol counseling." 118 Wn. App. at 206-208. The court reasoned the legislature intended a trial court "to prohibit the consumption of alcohol regardless of whether alcohol contributed to the offense." *Id.* at 206. However, absent evidence to show alcohol influenced the crime, the court ordered counseling was not "crime-related" and thereby erroneous. *Id.* at 207-08. *See also State v. McKee*, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (finding that community custody provisions prohibiting purchasing

and possession of alcohol were invalid when alcohol did not play a role in the crime).

Here, the trial court ordered Lynch to "abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale." CP 12, 22. Only the condition prohibiting Lynch from consuming alcohol is valid. *See* former RCW 9.94.700(5)(d) (2009); *Jones*, 118 Wn. App. at 208. The remaining alcohol prohibitions are invalid because there was no evidence to show Lynch was under the influence of alcohol when he sexually assaulted TS. *See Jones*, 118 Wn. App. at 208; *McKee*, 141 Wn. App. at 34.

This Court should remand and instruct the trial court to strike the alcohol prohibitions except the single condition that prohibits Lynch from consuming/using alcohol while on community custody.

2. The prohibition on non-prescribed drugs and drug paraphernalia.

As a condition of community custody, former RCW 9.94A.712(6)(a) (2009) and 9.94A.700(4)(c) (2009) required the trial court to order Lynch to abstain from any "controlled substances" except pursuant to lawfully issued prescriptions. *See also State v. Vant*, 145 Wn. App. 592, 603-04, 186 P.3d 1149 (2008) (regardless of the offense

committed, conditions prescribed under RCW 9.94A.700(4)(c) are required unless waived by the trial court).

Here, the trial court ordered Lynch to "abstain from the possession or use of *drugs* and drug paraphernalia except as prescribed by a medical professional[.]"CP 22. *See also* CP 13. While the State disagrees that Lynch would ever be prosecuted for possessing something as "benign as aspirin," *see* Brief of Appellant at 43, the State agrees the term "drugs" is imprecise. Because a new sentencing hearing is necessary to strike portions of the contested alcohol prohibition, the State does not oppose any clarification to the present condition. On remand, the trial court should clarify that Lynch "shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions." *See* RCW 9.94A.700(4)(c) (2009).

Additionally, this Court should instruct the trial judge to strike the condition that prohibits him from using or possessing "drug paraphernalia" because the prohibition is not related to the crimes Lynch committed.

3. The requirement that copies of prescribed medications be provided to the community corrections officer.

The condition to "provide copies of all prescriptions to [his] Community Corrections Officer within seventy-two (72) hours", *see* CP

13, 22, imposes affirmative conduct on Lynch. Requirements of affirmative conduct may be imposed if "reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. *State v. Kolesnik*, 146 Wn. App. 790, 807, 192 P.3d 937 (2008). However, the trial court may also require affirmative acts necessary to monitor compliance with other conditions or orders. *See State v. Acevedo*, 159 Wn. App. 221, 248 P.3d 526 (2010) (confirming a court's authority to impose polygraph and urinalysis conditions to ensure compliance with other conditions, including a non-crime-related prohibition against alcohol consumption). *See also* RCW 9.94A.030(13) (2009). Because the court is authorized to prohibit controlled substances, *see above*, the reporting requirement is a proper monitoring condition. *See State v. Motter*, 139 Wn. App. 797, 805, 162 P.3d 1190 (2007), *overruled on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

4. The requirement to pay counseling costs.

Former RCW 9.94A.712, .700(4), .700(5) (2009) authorize the court to impose numerous conditions on Lynch community custody. However, none of these provisions authorized the court to require Lynch to pay the costs of TS's counseling and medical bills. Such costs can be

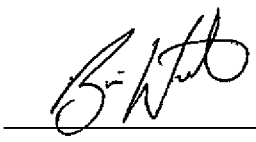
imposed as part of a restitution order under RCW 9.94A.753(3) (2009), but there was no restitution hearing in the present case. This Court should strike the condition that requires Lynch to pay counseling costs to TS.

IV. CONCLUSION:

In sum, the State respectfully requests that this Court affirm Lynch's convictions for rape in the second degree and indecent liberties. The State concedes that remand for resentencing is appropriate for the trial court to (1) impose a standard range sentence for the indecent liberties conviction, (2) clarify that the defendant must abstain from the possession or use of "controlled substances" unless prescribed by a medical professional, (3) strike the condition that prohibits the defendant from possessing alcohol or frequenting places where it is the chief item of sale, (4) strike the condition that prohibits the possession or use of drug paraphernalia, and (5) strike the condition that requires the defendant to pay the counseling costs of the victim.

DATED this October 10, 2011.

DEBORAH S. KELLY, Prosecuting Attorney



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Court of Appeals Case Number: 41749-9

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Answer/Reply to Motion: ____

Brief: __Respondent's__

Statement of Additional Authorities

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Objection to Cost Bill

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